IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1504

BAGLEY PRODUCE, INC.,

Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 5, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Bagley Produce, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix herein.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 20, 1975.

A timely petition for a rehearing was denied on February 12, 1975 and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S. C. sec. 1254(1).

QUESTION PRESENTED

Whether the decision of the Respondent that there was protected concerted activity on the part of the discharged employees was arbitrary and capricious and beyond the bounds of its discretion in that it was not based upon any substantial evidence.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28 (National Labor Relations Act):

> Sec. 157. Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

> Sec. 158. Unfair Labor Practices.
>
> (a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157;
>
> .....

STATEMENT OF THE CASE

Petitioner Bagley Produce, Inc., is a small family owned, controlled and operated food processor. Its business consists of purchasing iced chicken which is shipped into the plant by truck, separating and packaging the parts of the chicken and selling it to local stores and restaurants. Petitioner employs about fifty production laborers of which ten or twelve are cutters. All employees are paid at a flat rate plus a production incentive and it is the company's policy to review wages at the beginning of each year and to grant raises each year around the end of February.

In November and December of 1972 occasionally an individual asked Richard Lohendorf, the plant manager, about a raise and he told her that it would be handled the way it always has.

On February 7, 1973, the cutting room foreman informed Mr. Lohendorf that some cutters wanted to talk to him. Mr. Lohendorf then went to the lunchroom and asked what the problem was. Barbara Harrison, one of the cutters, said the girls wanted a fifteen cent raise. Mr. Lohendorf told her that there was no problem, that he would talk to his father, Andrew Lohendorf, and his

brother James, the other officers of the corporation, about it when they came into work. He said this several times and then Ms. Harrison said that they would not go to work unless they had a fifteen cent raise right then and there. Mr. Lohendorf again told her that there was no problem and that he would take care of it when his brother and father came in. He said that he had always kept his word with them in the past and that the cutters had a poor attendance record so that was no attitude to have. He then went back to his office and several girls started to leave. Two of the girls, Virgie Jean and Marilyn Wesley came to his office and asked him what they should do and he told them to punch in and go to work but they did not do so, but left the plant with several others.

When Andrew and James Lohendorf came into work a short time later, Richard told them that some of the girls had walked out and refused to work. They discussed the matter several times that morning but came to no final conclusion although Richard Lohendorf thought that the girls who left should have been fired because of disloyalty and refusing to work. In order to keep the production going and to avoid spoilage of the chicken the officers helped with the production and other employees were moved in to help with the cutting.

After lunch, Mike Colon, the cutting room Foreman, told Richard that the cutters were at a nearby tavern and that they were drinking. Soon thereafter the officers decided to give all employees a raise of ten cents an hour. They also decided that they would try to get the cutters to come back to the plant and to talk about going back to work. The president, Andrew, called over to the tavern at about 1:00 p.m. and asked if any of

the cutters were there. When told that only Ms. Harrison was still there he asked to speak to her. He asked her to come back to the plant to talk but she said that she was waiting for another cutter, Ollie McDowell, who would be back in a half-hour and asked if she could wait till she came so that they could both come over. Mr. Lohendorf agreed but a half-hour later Ms. Harrison called him back and told him that Ollie had not arrived yet and asked whether it would be alright if she waited a while longer before coming over. Mr. Lohendorf told her to come over immediately or forget it and she said that she would be over in a few minutes. When she did not show up after an hour, it was decided that the girls who had refused to work that morning should be discharged because they refused to work and because Ms. Harrison did not come back to talk after having been requested to do so.

At 3:00 Ms. Harrison finally showed up smelling like alcohol at the plant. By that time the discharge notices were already being sent out. The next morning, the discharged cutters came to the plant at their usual starting time and they were informed that they had been discharged because they had refused to work the day before and then they left.

At the hearing before the Examiner the discharged workers testified that they had been at the tavern after work on February 6, and that even though they could not remember who said anything nor what any particular person said they had come to some kind of an agreement to ask for a raise the next day before starting work. Ms. Harrison testified that they had also decided to wait until they got a raise before they would go to work. Neither did they get together to discuss a raise

nor any of the alleged decisions were ever made known to the Petitioner until the commencement of proceedings by the Respondent.

It was also testified to by the discharged workers at the hearing that they had refused to work on the morning of the day they were discharged because the Petitioner's plant manager, Richard Lohendorf, had given them the day off. Even the examiner found this testimony to be incredible, but she rationalized the inherent incredibility of the testimony by concluding, without any basis in the evidence of her conclusion, that despite their unanimous testimony to the contrary, the girls intentionally misinterpreted what they were told by the plant manager. The examiner's supporting reason for this conclusion is an unexplained "of course."

The testimony of the workers also included claims of unionizing activity at the bar after they had refused to work and had walked out. It is undisputed that if any such activity took place it never became known to the Petitioner until the commencement of this action against them.

Virtually all of the girls involved unanimously claimed they were not striking, that simply taking the day off because "Dickie Lohendorf" gave it to them.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals as to the Meaning of "Protected Concerted Activity."

It's crystal clear that on the basis of the testimony in this case, there was no Concerted Activity

with people willing to strike if the evidence establishing the taking of the day off because "Dickie" told us, is not to be believed there is no basis for the destructive decision ordered here.

The rule, first enunciated in First National Bank of Omaha v. NLRB, 413 F. 2d 921, 924 (1969), is that:

> Employees may seek to change any term or condition of their employment and their ultimate sanction is the strike. If they choose to strike over hours of work their strike is no different in quality or essence than is a strike over any other term of employment. What may make such a work stoppage unprotected is exactly what makes any work stoppage unprotected, that is, the refusal to assume the status of strikers with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so by striking unequivocally.

Employee activity which unreasonably interferes with the employer's production without placing a commensurate economic burden on the employees is unprotected. Shelly and Anderson Furniture Manufacturing Co. Inc. v. NLRB, 497 F. 2d 1200 (1974). Under the law just cited, the actions of the workers in this case clearly were not such as to be protected by the National Labor Relations Act.

The discharged employees testified that they had not walked out nor had they any intention of coercing the employer by leaving. Each and every

discharged employee unequivocally stated that she was only taking a day off.[1] By so doing they were placing the Petitioner's operations in jeopardy since it had to meet its contracts for deliveries and since it had to process the chickens on hand in order to make room for the next truck load. Thus, by spontaneously taking a day off the discharged employees created a great risk not only to the business of the Petitioner but also of spoilage of the chickens and thereby created a threat of food poisoning.

For their part, the discharged employees only wanted a one day vacation and return to work the next morning as if nothing had happened. Thus, they were not subjecting themselves to any economic burden while they were inflicting a devastating burden on the Petitioner.

In an early case the Court of Appeals of the Seventh Circuit defined the term strike:

> The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and refusing to resume work until the demanded concession shall have been granted. C. G. Conn v. NLRB, 108 F. 2d 390 (1939) ...

The testimony of the employees clearly indicates that they were not participating in any activity which could even remotely be called a strike. Although the Examiner found that the taking of the day off was pre-arranged, the testimony of Ms. Harrison, the purported spokesman of the group,

clearly indicates that there in fact had been no plan to engage in a work stoppage or in any other type of concerted activity.[2] When they left the plant on the morning of February 7, 1973, the discharged employees were only taking a one day holiday.

II. If the Decision Below Is Allowed To Stand The Entire Employer-employee Relationship Of American Business Will Be Adversely Affected.

It is hornbook law that in this country, unless he is limited by either a contract or statute, an employer has the right to discharge his employees at will, for any reason or for no reason at all. Mushroom Transportation Company v. NLRB, 330 F. 2d 683 (1964). Furthermore, under the National Labor Relations Act, it has been held that:

> Regardless of whatever concerted activities the employees were engaging in, if they were discharged for any other reason the employer does not violate the Act. Thus, the motivation of the employer in ordering the discharge is the crucial element in establishing a violation. NLRB. v. Ford Radio & Mica Corp., 258 F. 2d 457, 461 (1968).

Here it is undisputed that the Petitioner sent out the discharge notices only after the employees failed to meet with the Petitioner after being asked to do so and after the employees failed to meet with the Petitioner after being asked to do so and after they had taken a day off. Refusal to bargain and spontaneously taking a one day vacation surely are ample cause for discharge.

Furthermore, there can be no doubt that Petitioner never knew of the discharged employees alleged union activities since there is no testimony in the record from which it could even be inferred that Petitioner had such knowledge. [3]

The Petitioner acted, in discharging the employees, to protect his business. He was faced with chicken spoilage and possible people poisoning. To say that it was an unfair labor practice for it to fire seven or eight laughing girls out of a work force of fifty to sixty people, girls who knew that they would be getting a raise in the near future according to company policy, prior experience and assurances of Petitioner, girls who took the day off to imbibe at a bar, is to say that an employer must put up with any type of misconduct because it may turn out that there was a dispute that he did not know about. There is no indication that Congress intended the National Labor Relations Act to be used as a bar against any discharge.

III. Conclusion

There was more than ample cause for Petitioner to discharge the employees herein in question since they had placed his business in serious jeopardy by taking a day off. The evidence shows that the Petitioner was completely unaware of any concerted activity, union or otherwise, on the part of the employees and the record is completely void of any evidence upon which the Respondent could base its decision. To say that an employer must, in effect, use an Ouija Board, a divining rod or a crystal ball to determine what constitutes "protected concerted activities," under the circumstances of this case is patently unfair and unjust and must be regarded as an entirely new concept

of an American employer-employee relationship. The employees' own testimony clearly indicates that no concerted activity was ever planned, intended or carried out. Therefore, the Writ of Certiorari should issue to the Court Of Appeals of the Seventh Circuit so that this Court can prevent a serious injustice and clear up the confusion as to what is required to come within the National Labor Relation Act's protection as protected concerted activity.

Respectfully Submitted,

EISENBERG & KLETZKE

Counsel for Petitioner

FOOTNOTES

I. Ms. Barbara Harrison stated at the Hearing:

Q. Was Dickie approached by you on February 7 for the first time on this subject of whatever your problem was?

A. Dickie didn't approach me. I approached Dickie.

Q. Well, what was -- what was the first day you talked to him about this? Was it the morning you walked out?

A. To correct one thing, we didn't walk out.

Q. Well, were you pushed out?

A. Well, No. Weren't pushed out, either. He told us to leave. Told us to take the day off. (Tr. 172)

.....

Q. Then, why did you walk out?

A. Because for the simple reason he told us to take the day off. If I walk into your place and you tell me -- if you walk into my place, and I tell you to take the day off, what are you going to do? (Tr. 187)

.....

Q. Is it your statement that the only reason that you took off that day is because you were under the impression that Richard Lohendorf wanted you to take the day off?

A. Right. (Tr. 197)

.....

Q. Now, if the reason you took off was because Richard Lohendorf told you to take off, was there any other reason that you took off, or was that the only one?

A. That was the only one.

Q. At any time, did you thank him for giving you the day off? So you spent practically the whole day in a tavern; is that where you were?

A. Practically. (Tr. 198)

Ms. Harrison's testimony was further supported by Maria Hall at the hearing:

Q. Right? All right. Now, the next thing that happened is that you claim he said you can take the day off; is that right?

A. I didn't claim nothing. That's what he said.

Q. All right, and what -- did you decide not to punch in that day because he told you to take the day off?

A. Well, why should we punch in when he said take the day off?

Q. All right. So it was your -- When he said that, then your only reason for not working at that point after he made that statement is that he told you to take the day off?

A. That's right. (Tr. 389-390)

Marilyn Wesley stated:

Q. All right. Then when you left, was it because of your finger or because --

A. No.

Q. -- you understood --

A. No, it wasn't.

Q. -- that Dickie told you to take the day off?

A. I left because he said, take the day off.

Q. I see. Now, did you hear Dick say that or did you -- were you told that by Barbara Harrison?

A. No one told me anything. I heard him say it for myself.

Q. Were you talking to him at the time?

A. When I left, he say, take the day off. I heard it for myself. I was sitting in the lunch room. (Tr. 408-409)

At the hearing Lena Roby stated:

A. Dickie came out and he said, now girls, what can I do for you? And he put his arms around me and Ollie.

Q. Did he say anything at that point, do you remember?

A. Who, me? No, I didn't say anything.

Q. No. I say, did Richard Lohendorf say anything at that point when he put his arm around you and Ollie McDowell?

A. Yes. He say, well, girls, what can I do for you.

Q. Right. After this conversation with Richard Lohendorf in his office, what did you do then?

A. He told us to take the day off, so I left.

Q. Where did he say that?

A. In his office.

Q. Do you remember what else he said in the office?

A. No.

Q. O.K. You say you left. Where did you go?

A. To the tavern. (Tr. 426-427)

Ethel Jones testified as follows:

Q. So did you decide to take the day off because he told you to take the day off or because you felt you wanted to take the day off?

A. Yes. I felt if he was good enough to give us the day off, he was going to give us the raise when we come back.

Q. I see. So you -- you decided in your mind that you were going to take the day off because he was good enough to give you the day off?

A. Right.

Q. That was pretty decent of him, wasn't it?

A. Yes, it was. (Tr. 460)

Ollie McDowell testified:

Q. (By Mr. Eisenberg) No, with reference to this walk out, is it your position that this walk out was a planned walk out?

A. We didn't walk out.

Q. Well, is it your position that if it wasn't a walk out, that you left because and only because you were told to take the day off?

A. Right.

Q. Now, at the time that you were told to take the day off, that was -- if what you say is correct as you've said it, that would have been the morning of what day?

A. Wednesday, February 7, 1973.

Q. All right, and you believe on that morning that you and anybody else who left, left because Richard Lohendorf, otherwise known as Richard and other wise known as Dickie in this hearing, told you to take the day off?

MR. GRECO: Objection.

Q. (By Mr. Eisenberg) Is that correct?

MR. GRECO: There's no foundation as to how she would know -- I'm sorry. I don't want to -- I don't know if it's proper to give the reason for the objection. I don't want to say that I'm supplying an answer.

JUDGE BOILES: Well, the witness can answer so far as she knows.

Q. (By Mr. Eisenberg) So far as you know.

A. Would you repeat the question?

MR. EISENBERG: Sure. Would you read it to her, please?

(Question read)

THE WITNESS: Yes. (Tr. 321-322)

II. CROSS EXAMINATION BY MR. EISENBERG of Ms. Harrison:

Q. So, with yourself, that would have only been six girls; is that right?

A. I guess so.

Q. And, did you take anything to a vote?

A. No.

Q. Did you elect anybody as chairman, or president or spokesman?

A. No.

Q. Now, what did -- that evening, what did Ollie have to say while you were at the tavern with her?

A. Like I told my Attorney, everybody was talking. I can't remember specifically, word for word what any particular person said.

Q. I see. So, you can't remember anything Ollie said that evening; is that right?

A. No.

Q. What about Virgie Dennis?

A. Same thing.

Q. You don't recall her saying anything; is that right?

A. Right.

Q. And, with reference to Lena Roby, do you remember her saying anything that evening?

A. No.

Q. No? What about Ethel Jones, do you remember her saying anything about evening?

A. No.

Q. Pardon?

A. No.

Q. And, Maria Hall, do you recall her saying anything that evening?

A. No.

Q. All right. You do recall that you were saying that you were going to ask for a fifteen cent raise. Is that right?

A. Right.

Q. And, if not, you said you would take no lower -- nothing lower than a dime; is that right?

A. Right.

Q. I see. Now, was that the sum and the substance of what happened there that evening?

A. I guess so.

Q. And, this was at the bar?

A. Yes.

Q. Next door, is it?

A. Yes. (Tr. 178-179)

.....

III. The Board witness, Michael Colon, brought into prove the employer knew of the "concerted effort" testified absolutely to the contrary:

MICHAEL COLON DIRECTION EXAMINATION adversely by MR. GRECO:

Q. (By Mr. Greco) What's your name?

A. Michael Colon.

Q. Address?

A. 2035 North Horton.

JUDGE BOILES: Spell your last name, please.

THE WITNESS: C-o-l-o-n.

JUDGE BOILES: C-

THE WITNESS: C-o-l-o-n.

JUDGE BOILES: C-o-l-o-n.

Q. (By Mr. Greco) Where do you work?

A. Bagley Produce.

Q. And what's your job there?

A. Manager.

Q. Tell us your duties.

A. Manager over the cutting room.

MR. GRECO: Like to proceed under 43-B, Your Honor.

MR. EISENBERG: We're going to object.

JUDGE BOILES: I'm not sure -- you haven't qualified him for that yet.

MR. GRECO: Okay.

JUDGE BOILES: If you feel you want to call him as a 43-B witness, you'd have to qualify him more.

Q. (By Mr. Greco) What are your duties as a manager?

A. Assign girls to work.

Q. What else?

A. Production.

Q. Hire people?

A. No.

Q. Fire people?

A. I can recommend but not hire,

Q. Do you fire people, recommend firing?

A. I do recommend, yes.

Q. Recommend promotions?

A. Promotion?

Q. If you have any, I'll withdraw that question. Do you recommend discipline?

A. Yes.

Q. Do you recommend that people be disciplined or suspended or something?

A. Right.

Q. Do you direct the girls every day?

A. Yes.

Q. Did you tell the company on Wednesday, February 7, 1973, that you had seen the girls in the tavern?

A. Yes.

MR. GRECO: Your Honor, can I proceed now?

JUDGE BOILES: I don't think you've qualified him as a 43-B witness, no. I don't think he's a managing agent. A supervisor but not a managing agent.

MR. GRECO: Okay.

Q. (By Mr. Greco) Did you go the tavern that day?

A. Yes.

Q. Who did you see there?

A. The cutters that were involved in the walkout.

Q. Who?

A. Barbara Harrison, Lena Roby, Ollie McDowell, Cora Tatum, Ethel Jones, Virgie Jeans. I think that's all I can remember.

Q. And after -- they show you the cards they had?

A. They show me the cards?

Q. You saw some cards there, didn't you, in the tavern?

MR. EISENBERG: Wait just a moment. I'm going to object to Counsel trying to lead a witness. This is his witness.

JUDGE BOILES: I sustain the objection.

Q. (By Mr. Greco) Did anyone ask you how many employees were in the unit or in the plant?

A. Well, Barbara Harrison come up to me once but I don't recall what she asked me.

Q. You don't recall?

A. No.

Q. Do you recall if anyone else said anything to you?

A. No.

Q. What did you do after you left the tavern?

A. Went back to work.

Q. Did you speak to anyone at work?

A. Spoke to Richard.

Q. And what did you tell him?

A. The girls were over there.

Q. Doing what?

A. They were just over there. He asked me if they were drinking. I said there was glasses in front of them.

Q. Did you indicate one way or another whether they were drinking liquor?

A. No, sir.

Q. Did you have any knowledge of whether they were drinking.

A. I paid no attention.

Q. What else was said to Richard?

A. I went back to work in back.

Q. Did you have any further discussions with him that day?

A. Oh, I probably spoke to him a couple times.

Q. About the cutters, I mean?

A. No, not about the cutters.

Q. How about the next day.

A. Well, that day I found later, around 4:30, they were fired, they weren't coming back.

Q. How did you find that out?

A. I was told by the office, Richard.

Q. What did he say?

A. That the girls won't be coming back.

Q. Did he say why?

A. No.

MR. GRECO: No further questions.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 74-1094

(Caption Omitted)

JUDGMENT

Before: Fairchild, Stevens, Circuit Judges and Markey, Chief Judge.*

THIS CAUSE came on to be heard upon the petition of Bagley Produce, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors and assigns, on December 28, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 20, 1975, and at the conclusion of oral argument handed down its decision granting enforcement of the Board's order and denying the petition for review.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the petition to review be denied, the said order of the National Labor Relations Board in said proceeding be enforced, and that Bagley Produce, Inc., its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

*Of United States Court of Customs and Patent Appeals.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

A True Copy:
Teste:

/s/ Thomas F. Strubbe
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

/s/ Thomas E. Fairchild
Judge, United States Court
of Appeals for the Seventh
Circuit

/s/ Howard T. Markey
Chief Judge, United States
Court of Customs and
Patent Appeals

/s/ John Paul Stevens
Judge, United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 12, 1975

Before

HON. THOMAS E. FAIRCHILD, Chief Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. HOWARD T. MARKEY, Chief Judge,
U.S. Customs & Patent Appeals

Petition for Review of an Order of the National Labor Relations Board.

(Caption Omitted)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JANUARY 20, 1975

Before

HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. HOWARD T. MARKEY, Chief Judge,
Court of Customs and Patent Appeals*

Petition for Review of an Order of The National Labor Relations Board

(Caption Omitted)

ORDER

The court having considered the briefs, addressed itself to the record in the above entitled appeal, and having announced its conclusion in open court after hearing oral argument that, contrary to Petitioner's contentions, substantial evidence in the light of the whole record supports the

* Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

Board's finding that the company discharged employees because they engaged in protected, concerted activities and that judgment enforcing the order of the Board will be entered,

IT IS ORDERED that a decree enforcing the Board's order be submitted and settled pursuant to Rule 19, F.R.A.P.

MFJ
D-8239
208 NLRB No. 13 Milwaukee, Wis.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

BAGLEY PRODUCE, INC.

and Case 30-CA-2252

FREEDOM THROUGH EQUALITY, INC.

DECISION AND ORDER

On August 22, 1973, Administrative Law Judge Fannie M. Boyls issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and

brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order as herein modified.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, Bagley Produce, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified.

1. Delete from paragraph 1(a) the words "including union activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. Dec. 28, 1973.

Edward B. Miller, Chairman

[1] We find it unnecessary to reach the question whether Respondent violated Sec. 8(a)(3) of the Act in view of the substantial evidence that Respondent violated Sec. 8(a)(1) and the sufficiency of the Remedy. Therefore, we have amended the Order and the notice to conform with the above.

John H. Fanning, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR
RELATIONS BOARD

208 NLRB No. 13

CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

On January 31, 1974, pursuant to Section 10(f) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) Bagley Produce, Inc., instituted the caption proceeding by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board on December 28, 1973, in a case appearing on the records of the Board as Case No. 30-CA-2252.

Pursuant to Section 10(f) of the Act and Section 15(b) of the Federal Rules of Appellate Procedure, the Board files this cross-application for enforcement of said order.

In support of this cross-application, the Board respectfully shows:

(1) The Petitioner is a party aggrieved by a final order of the Board. This Court therefore has jurisdiction of this cross-application for enforcement by virtue of Section 10(f) of the National Labor Relations Act, as amended.

(2) Upon the due proceedings had before the Board in said matter, the Board on December 28, 1973, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Petitioner, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon the Petitioner by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Petitioner.

(3) Pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Rule 17 of the Federal Rules of Appellate Procedure, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this cross-application and transcript to be served upon the Petitioner and that this Court take jurisdiction of the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring the

Petitioner, its officers, agents, successors, and assigns, to comply therewith.

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 8th day of March, 1974.

CERTIFICATE OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board -- Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 30-CA-2252.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Administrative Law Judge Fannie M. Boyls on June 6, 7 and 8, 1973, together with all exhibits introduced into evidence.

2. Copy of Administrative Law Judge's Decision issued August 22, 1973.

3. Copy of Administrative Law Judge's Errata dated August 23, 1973.

4. Copy of Petitioner's[1] Exceptions to the Administrative Law Judge's Decision, received October 1, 1973.

5. Copy of Decision and Order issued by the National Labor Relations Board on December 28, 1973.

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[1]Petitioner herein was Respondent before the Board.

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 8 day of March, 1974.

/s/ John C. Truesdale
John C. Truesdale
Executive Secretary
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Supreme Court, U. S.
FILED
JUL 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1504

In the Supreme Court of the United States

OCTOBER TERM, 1975

BAGLEY PRODUCE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 3-4) is unreported. The Board's decision and order (Pet. App. 4-6)[1] are reported at 208 NLRB No. 13.

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[1] The decision of the Administrative Law Judge, whose factual findings were adopted by the Board, was not printed in the appendix to the petition and is appended here, *infra*, pp. 5a-33a.

JURISDICTION

The order of the court of appeals was entered on January 20, 1975, and a petition for rehearing was denied on February 12, 1975 (Pet. App. 2-3). The petition for a writ of certiorari was filed on May 13, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company discharged 10 employees because they engaged in concerted activities protected by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. 2-3.

STATEMENT

The employees of the Company, which processes iced chicken, are not represented by a union. The Company's policy is to review wages and grant increases after the first of the year (App., *infra*, p. 9a). In November 1972, three production employees who work on the cutting line—Barbara Harrison, Ollie McDowell, and Ethel Jones—individually asked Plant Manager Richard Loehndorf for raises. Loehndorf told Harrison to wait until the beginning of the

year, and informed the others to increase their production. In January 1973, McDowell and Jones requested raises based on their increased production and Loehndorf responded that he would give them a raise, but he did not say when (App., *infra*, p. 10a).

On February 6, 1973, employees Harrison, McDowell, and Jones, together with another cutter, decided to get together and ask Plant Manager Loehndorf for a raise. During the afternoon break, they talked to several other cutters and made plans to meet after work to decide how much to ask for and how to obtain it. At quitting time, six cutters met at a tavern next door to the plant where employees often ate breakfast and lunch, and agreed to go to the plant lunchroom at 6:45 the next morning to ask Loehndorf for a 15-cent raise (App., *infra*, pp. 10a-11a). The next day, nine cutters assembled in the plant lunchroom, and, instead of punching their timecards and going to work, sent word to Plant Manager Loehndorf that they wanted to speak to him. When Loehndorf arrived, Harrison stated on behalf of the group that the cutters wanted a 15-cent raise. Loehndorf refused to discuss the amount of the raise or make an immediate commitment; he demanded that the cutters either start work or "take the day off." Thereupon all nine cutters walked out (App., *infra*, pp. 11a-13a).[2]

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[2] They were later joined by a tenth cutter, Cora Tatum, who had been absent from work in the morning due to a doctor's appointment (App., *infra*, p. 13a).

The cutters went to the nearby tavern where they decided to seek help from a labor union. After discussing their situation with a representative of Teamsters, Local 200, the cutters returned to the tavern, and, as instructed by the union representative, solicited those of their fellow employees who came to the tavern to eat to sign union authorization cards (App., *infra*, pp. 13a-14a). Later in the day, Company President Andrew Loehndorf summoned employee spokeswoman Harrison to the plant, where she was informed that the cutters were being discharged for walking off the job (App., *infra*, pp. 16a-18a).[3] Later that afternoon the 10 cutters received telegrams stating as follows (App., *infra*, p. 18a, n. 7):

> You are hereby notified that you are dismissed from the employment of Bagley Produce, Inc. because of refusal to work at 7 a.m. on Wednesday, February 7, 1973. Your checks will be ready between 12:30 and 1:30 p.m. on Thursday, February 8, 1973.

The Board, adopting the decision of its Law Judge, held that the Company violated Section 8(a)(1) of the Act by discharging nine cutters because they engaged in a protected walkout and cutter Tatum because she joined the others (Pet. App. 4-6; App., *infra*, pp. 23a-25a). The Board rejected the Company's contention that the employees were not engaged in concerted activity because they thought they

[3] That same day, the Company decided to give its remaining employees a 10-cent pay raise (App., *infra*, p. 15a).

were just obeying their employer's injunction to "take the day off," stating (App., *infra*, p. 23a):

> There can be no question but that the walkout of the cutters on the morning of February 7 was concerted action on their part as a consequence of or in connection with their attempt to discuss and obtain an immediate wage increase. It grew out of a "labor dispute" within the meaning of Section 2(9) of the Act. Although they purported to interpret Loehndorf's statement to them as a grant of a day off, they, of course, did not believe that he was willingly giving them a day off from work. As employee McDowell acknowledged, and as must have been apparent to the other cutters, Loehndorf appeared unhappy and disturbed when they started walking out. The fact that the employees deliberately sought to misinterpret Loehndorf's remarks to mean what they believed was to their advantage does not, however, alter the fact that they were acting in concert to accomplish their purpose—the prompt granting of a wage increase. * * *

The Board ordered the Company, *inter alia*, to reinstate the discharged employees with backpay (Pet. App. 5; App., *infra*, pp. 29a-30a).

The court of appeals "announced its conclusion in open court after hearing oral argument," finding "contrary to Petitioner's contentions, [that] substantial evidence in the light of the whole record supports the Board's finding that the company discharged employees because they engaged in protected, concerted activities * * *" (Pet. App. 3-4).

ARGUMENT

The petition acknowledges (Pet. 2) that the sole issue presented is whether there is evidentiary support in the record for the Board's finding that the Company discharged 10 employees because they engaged in concerted activity protected by Section 7 of the Act. Such an issue, which turns on the particular facts of this case, does not warrant review by this Court. In any event, the facts summarized above amply support the Board's finding.[4] See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9. Nor, for the reasons given by the Board (*supra*, p. 5), is a different conclusion warranted because the employees may have thought that they were merely taking a day off.

[4] There is no record support for petitioner's assertion (Pet. 10) that it acted to protect its business, since it was faced with "chicken spoilage and possible people poisoning."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

JULY 1975.

APPENDIX

MFJ
D—8239
208 NLRB No. 13 Milwaukee, Wis.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 30-CA-2252

BAGLEY PRODUCE, INC.

and

FREEDOM THROUGH EQUALITY, INC.

DECISION AND ORDER

On August 22, 1973, Administrative Law Judge Fannie M. Boyls issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order as herein modified.[1]

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[1] We find it unnecessary to reach the question whether Respondent violated Sec. 8(a)(3) of the Act in view of the substantial evidence that Respondent violated Sec. 8(a)(1) and

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, Bagley Produce, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as modified.

1. Delete from paragraph 1(a) the words "including union activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated December 28, 1973, Washington, D.C.

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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the sufficiency of the Remedy. Therefore, we have amended the Order and the notice to conform with the above.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against any of our employees because they have engaged in protected concerted activities for their mutual aid and protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL offer to each of the employees listed below immediate and full reinstatement to the job she held immediately before February 7, 1973, or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and WE WILL make each whole for any loss of earnings she may have suffered as a result of her discharge, plus 6-percent interest:

Lena Roby
Ollie McDowell
Ethel Jones
Maria Hall
Marilyn Wesley
Vergie Dennis
Virgie Jeanes
Cora Tatum
Barbara Harrison

BAGLEY PRODUCE, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance wit hits provisions may be directed to the Board's Office, Commerce Building, Second Floor, 744 North Fourth Street, Milwaukee, Wisconsin 53202, Telephone 414—224-3861.

JD-540-73
Milwaukee, Wisc.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Case No. 30-CA-2252

BAGLEY PRODUCE, INC.

and

FREEDOM THROUGH EQUALITY, INC.

Amadeo Greco, Esq., of Milwaukee, Wisc., for the General Counsel.
Sidney Eisenberg, Esq. (Eisenberg & Kletzke), of Milwaukee, Wisc., for the Respondent.

DECISION

Statement of the Case

FANNIE M. BOYLS, Administrative Law Judge: This case, initiated by a charge and amended charge filed respectively on March 1 and April 24, 1973, and a complaint issued on April 26, 1973, was tried before me in Milwaukee, Wisconsin, on June 6, 7 and 8, 1973. The complaint alleged and Respondent's answer denies that Respondent had violated Section 8(a)(3) and (1) of the Act by discharging 10 employees because they engaged in protected, concerted activities and/or because they engaged in activities on behalf of Teamsters "General" Local No. 200,

affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen Helpers of America. At the conclusion of the hearing counsel for the General Counsel and for Respondent argued orally upon the record. Thereafter Respondent also filed a brief.

Upon the entire record in this case, from my observation of the demeanor of the witnesses, and after a careful consideration of Respondent's brief, I make the following:

Findings of Fact

I. Jurisdictional findings

Respondent is a Wisconsin corporation engaged at Milwaukee, Wisconsin, in the processing and precooking of poultry. During the calendar year 1972, which is a representative year, Respondent purchased goods valued in excess of $50,000 in interstate commerce, directly from points outside Wisconsin. Upon the basis of these admitted facts, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Teamster "General" Local No. 200, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Preliminary Statement and Issues*

The nine employees here involved, who walked out of Respondent's plant on February 7, 1973 following an unsuccessful attempt to get immediate wage increases,[1] and one other employee, Cora Tatum, who joined the group later were not represented by a labor organization at the time of their walk-out but thereafter on the same morning signed cards for Teamsters Local 200. The General Counsel contends that their discharge in the afternoon of the same day was in violation of Section 8(a)(1) of the Act because it intereferred with, restrained and coerced the employees in the exercise of their rights protected under Section 7 of the Act to engage in concerted action for their mutual aid and protection and that the discharges were additionally in violation of Section 8(a)(3) of the Act because they constituted discrimination in employment to discourage membership in the Union.

Respondent defends its discharge of the employees by asserting that the employee's action in walking out was individual, not concerted, action, that it was not protected concerted activity and that Respondent properly discharged nine of the employees for walking off their jobs and refusing to work that day

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[1] Lena Roby, Ollie McDowell, Ethel Jones, Maria Hall, Barbara Harrison, Marilyn Wesley, Vergie Dennis, Vigie Jeanes and Hilda Cruz. (Vigie Jeanes' first name is incorrectly spelled "Vergie" in the complaint.)

and the other employee because of excessive absenteeism and her refusal to work on February 7.

Respondent also asserts that the complaint should be dismissed because the party filing the charges was not shown to have had any interest in the proceeding or any right to initiate this proceeding.

B. *The Procedural Issue*

Following their discharge the employees here involved went to the National Association for the Advancement of Colored People (NAACP) for advice. They were referred by that organization to an attorney, Nelson G. Alston, staff attorney for an organization called Freedom Through Equality, Inc. After interviewing the employees, Alston referred them to one of the attorneys for the National Labor Relations Board and filed a charge and an amended charge in their behalf as staff counsel for Freedom through Equality, Inc.

Respondent's contention, reasserted in its brief, that the Charging Party was not qualified to file a charge was rejected at the commencement of the hearing and the ruling then made is now reaffirmed. Respondent's objection is completely answered by the ruling of the Supreme Court in *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 17-18, wherein it stated:

> The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings Senator Wagner, sponsor of the Bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a pleading. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

C. *The Subsidiary Facts*

Respondent is a family-owned corporation run by Andrew Loehndorf, the president, and his two sons, James Loehndorf, the vice president and treasurer, and Richard Loehndorf, the secretary, with the assistance of Donald Ledrowski, the comptroller and office manager and three supervisors over the cooking, sizing and cutting rooms, respectively. Richard, usually called Dick or Dickie Loehndorf, is the plant manager and in general control of the day-to-day operations and the hiring of personnel. Respondent's business consists of the precooking and processing of iced chickens which are delivered to it in truckloads. It employs about 65 production, maintenance and truck driving employees. About 40 employees are employed in the cutting operations. Cutting is done with knives, with machines and with saws. Ten women, the employees here involved, worked on the saw cutting line, the most difficult and highest-paid operation performed by the women employees.

It has been Respondent's policy, according to Plant Manager Loehndorf, to review wages and grant increases after the first of the year—usually between mid-January and the last week in February. A general four percent wage increase had been given to all the employees on February 26, 1972. Prior to February 1973 several of the cutters had inquired of Plant Manager Loehndorf about an increase in their pay. In November 1972, one of them, Barbara Harrison, told Loehndorf that she had increased her production from 60 to 80 boxes a day and thought it was time she got a raise. He told her to wait because "at the beginning of the year," everyone would get a raise. Also in November two other cutters, Ollie McDowell and Ethel Jones, asked Leohndorf when they were going to get a raise. He responded that they would get a raise when they cut more boxes of chickens. They returned sometime in January and Jones told Loehndorf that she was cutting more boxes and wanted a raise. He told McDowell and Jones that he had always been fair to them and would give them a raise but did not say when.

When by February 6 no raise was forthcoming, several of the cutters during their 2:30 p.m. break period decided to meet after work that day at a tavern next door to the plant for the purpose of making plans to seek raises. Six of them met at the tavern just after 3:30 p.m., their quitting time,

for that purpose.[2] They decided that they would meet in the plant lunchroom the next morning about 15 minutes before their 7 a.m. starting time and ask Richard Loehndorf for a 15-cent raise in pay and that they would not settle for less than a 10-cent increase. It was also agreed that Barbara Harrison would do the talking for the group.

As had been agreed upon, the cutters gathered in the plant lunchroom before 7 a.m. on February 7 for the purpose of making their demand for wage increases. At about 7 a.m., Harrison requested the cutting room supervisor, Mike Colon, to notify Richard Loehndorf that they wanted to talk to him. Loehndorf arrived shortly thereafter and asked what their problem was. Harrison responded that the cutters wanted a 15-cent raise in their pay. There is some conflict in the testimony as to exactly what was said thereafter and in what sequence. I doubt that any one witness was fully accurate in relating all the details and some clearly had better memories than others. However, after a careful analysis of all the testimony, and upon a preponderance of the credible evidence, I find that the following is a substantially accurate summary of what then transpired. Loehndorf assured the cutters that they would get a raise within the next few weeks but that he could not give them one without first talking the matter over with his father and brother. He stated also

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[2] Barbara Harrison, Ollie McDowell, Vergie Dennis, Lena Roby, Ethel Jones and Maria Hall.

that he was too busy working on a machine to talk to them about a raise at that time and requested them to punch in and go to work. Harrison expressed the view that since Loehndorf had the authority to hire and fire them and give them days off, he should also have the authority to attempt to give them a raise. She stated that the cutters wanted to know about the raise that day and that they would not work unless they were assured of a raise. Loehndorf told the group that if they did not have enough faith and trust in him to let him talk the matter over with his father and his brother first they could just take the day off.

As the cutters started making preparations to leave the plant, Loehndorf called Harrison to his office. She, in turn, requested the other cutters to accompany her and learn "from the horse's mouth" what Loehndorf had to say. Loehndorf told the cutters that he had been lenient and fair with them in the past and he did not understand why they wanted to put him in the position he was in by taking the action they were about to take. He told them that he had been putting in 100 hours a week on the machine he was then working on and that he was tired and had not had time to sit down and talk to his father and brother about a raise but that he would do so. Harrison told him that she expected an answer before the day was over. McDowell asked if the cutters could sit in the lunchroom and wait until his father and brother arrived. Loehndorf said "no." He told them that if they were not going to work, or if

they did not trust him to be fair with them, they should "just take the day off."

Seizing upon the latter statement as a purported direction, the cutters in a gay mood started leaving the plant. Office Manager Ledrowski observed them laughing and joking. He heard Harrison say, "They gave us the day off" and others said, "We've got the day off—let's go." As they were leaving, one of them, Jones, told some of the others, "When I get back in the morning, . . . I bet you I have a raise." The others responded, "We'll wait and see." All of the saw cutters who left the plant that morning except Hilda Cruz adjourned to the tavern next door.

While at the tavern they decided to try to obtain the assistance of a labor organization and made an appointment to see someone at the office of Teamsters Local 200. Since Harrison was the only cutter who had a car available for transportation and all could not ride in her car, another cutter, Ollie McDowell, telephoned Cora Tatum, a cutter to whom McDowell had loaned her car that day in order to enable Tatum to keep an appointment with her doctor, and requested Tatum to bring the car to the tavern. Tatum did so and accompanied the other cutters to the union office. There they were told that the Union could not help them unless over 50 percent of the employees signed union authorization cards. They then took a stack of cards with them and arrived back at the tavern at about 11 a.m. There each of them signed a card. They also obtained signatures on cards from some of the other employees who ate lunch at the

tavern during their 11:15 a.m. lunch break.[3] In addition, one employee identified only as "Willie" took a few cards back to the plant with him in order to get them signed by several of the Puerto Rican women who did not speak English and seldom came to the tavern. He returned some signed cards to Harrison at about 11:30 a.m. and she placed them with a stack of other signed cards on the bar. Among those who came to the tavern and sat at the bar at the 11:15 lunch break were Mike Colon, supervisor of the cutting room, where the cutters here involved worked, and Don Miller, supervisor of the sizing room. Harrison asked Colon how many employees worked at the plant, but did not explain the reason for her question. He replied that there were about 30 or 35.[4] At that time Harrison had about 23 signed union cards in her possession and she told the other cutters that they had enough cards signed. She called the union hall and made an appointment for 2 p.m. She drove some of the cutters home but returned to the tavern in time to talk to any employees who might come to the tavern at the 12:30 lunch break. None came at that time.

In the meantime, during the morning of February 7, after Andrew Loehndorf and his son James arrived at the plant, several meetings were held by

[3] The tavern served food as well as alcoholic and non-alcoholic beverages. Some of the employees had breakfast as well as lunch there.

[4] This was apparently the approximate number of employees in the cutting department at that time.

them with Richard Loehndorf and the officer manager, Ledrowski, to discuss the walkout and raises for the employees. It was decided during the morning that raises would be granted to all the employees, including the cutters who had walked out, but the amount of the raises—which it was finally decided would be 10 cents an hour—was not determined until about 12:30 p.m. that day.[5] This decision was announced to all the employees later that day.

[5] The above findings in this paragraph are based upon the testimony of Richard Loehndorf given in response to questions by the General Counsel when examining him at the commencement of the hearing. Thus, Loehndorf was questioned and answered as follows:

Q. Did you discuss it [the raise] in the morning?
A. Well, we had a few words about the girls getting a raise, yes.

* * * *

Q. What was the figure?
A. I would say the final figure came about 12:30, around there.

* * * *

Q. And, the raise would be effective for all the employees in the plant?
A. Yes.
Q. Including the cutters?
A. Yes.
Q. Including the cuttters who walked out that day?
A. Yes.

* * * *

Q. And, the raise would have been how much?
A. Well, we decided to give the plant a 10-cent per hour raise.

I do not credit later inconsistent and contradictory testimony given by Richard Loehndorf and by Office Manager Ledrowski.

Having learned from Supervisor Colon that the cutters were at the tavern during his luncheon period, Andrew Loehndorf, Respondent's president, at about 1 p.m., called the tavern and asked if any of the girls were there. He was told that Barbara Harrison was there and she was then called to the telephone. According to Harrisons' credited testimony, corroborated by Richard Loehndorf's initial account when testifying under Rule 43(b) in response to the General Counsel's questions, Andrew Loehndorf told her that he wanted to talk to the girls, but that since she was the only one there, he would like to talk with her. He asked if she would come to the plant. She replied that she was waiting for Ollie McDowell, whom she was expecting in 15 minutes or a half hour, and asked if he could wait until McDowell arrived. He said "All right." When McDowell did not arrive within a half hour, Harrison called Andrew Loehndorf back, informed him of this fact and asked if he could wait a few minutes longer. He replied that if she could not come "right away," she should forget it. She then told him she would be there in a few minutes.[6]

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[6] Andrew Loehndorf did not testify. Donald Ledrowski, Respondent's office manager, who says he listened to the conversation over an extension telephone in his office, testified that Andrew Loehndorf told Harrison over the telephone that he wanted her to come back to work—this apparently in support of a theory, which developed as the hearing progressed, that the cutters were fired because they refused to come back to work when called and that Harrison appeared to have been drinking alcoholic beverages (a charge denied by Harrison) and that she was in no condition to work when she finally

Harrison thereupon telephoned McDowell and told the latter what Andrew Loehndorf had said to her. McDowell, having loaned her car to Cora Tatum for an appointment with her doctor, could not come to the tavern and advised Harrison to see Loehndorf alone. Either before or after calling McDowell, Harrison also called employee Dennis about Andrew Loehndorf's request to talk to her. Dennis advised her not to go alone. McDowell had already telephoned another cutter, Jones and asked her to go with Harrison to see Andrew Loehndorf, but Jones had no means of transportation and could not go. Harrison finally went to the plant alone but did not arrive until about 3 p.m. When she walked into the office where Richard and Andrew Loehndorf and Don Ledrowski were waiting, she asked "What did you want?" Richard Loehndorf replied that telegrams were in the process of being sent to all the cutters

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came to the plant. Ledrowski impressed me as being overly anxious, in this as well as other aspects of his testimony, to support any theory which, in his view, might help Respondent's case. Richard Loehndorf indicated in response to questions by the General Counsel when called under Rule 43(b), that his father asked Hårrison "to come over to talk to us . . . . Just to come over to talk, and see if we can talk about what happened." He explained, "We were going to tell them that we were going to give them a raise." He later changed his testimony by asserting that his father asked Harrison "to come on back to work." I find Harrison a far more credible witness than either Ledrowski or Richard Loehndorf and credit her testimony, supported by Richard Loehndorf's initial testimony, rather than his later testimony and Ledrowski's regarding what was said during the telephone conversations between Andrew Loehndorf and Harrison.

informing them that they were being dismissed for having walked off their job.[7]

Harrison then returned to the tavern and telephoned the other cutters about what had happened. She suggested that they all report to the plant at 6:45 the following morning to inquire as to why they were fired when they were told they could take the day off. Most of them did report to the plant at that time. Richard Loehndorf denied telling them to take the day off. Cora Tatum asked why she was fired when she had been out sick the day before. Loehndorf replied that he had heard she was with the other girls at the tavern on the day before and had therefore concluded that she "was in with them" and so "must go, too." [8]

One of the 10 cutters, Hilda Cruz, was reinstated on Friday, February 9. She telephoned her supervisor, Colon, on the night of February 7, after receiving the discharge telegram, and explained to him that she had walked out, after punching in that morning, because she had been told by the other cutters that there was no work to be done. She told Richard Loehndorf the same thing on Friday. He believed her and put her back to work. She had not come back to the plant on February 8 because of illness.

[7] All the cutters were sent identically worded telegrams that afternoon stating:

> "You are hereby notified that you are dismissed from the employment of Bagley Produce, Inc., because of refusal to work at 7 a.m. on Wednesday, February 17th, 1973. Your checks will be ready between 12:30 and 1:30 p.m. on Thursday, February 8th, 1973."

[8] The findings in the above paragraph are based upon the credited testimony of Harrison and Tatum. Supervisor Mike Colon reported to Loehndorf after lunch on the day before that he saw Tatum in the tavern with the other cutters. Tatum, as already noted, had in fact come to the tavern to deliver the car which McDowell had loaned her to meet a 1 p.m. doctor's appointment that day, and she accompanied the cutters to the union office then returned with them to the tavern before leaving with McDowell's car.

D. *Analysis and Conclusions*

The complaint alleges that Respondent discharged the cutters "because they engaged in protected, concerted activities, and/or because of their activities on behalf of the Union," in violation of Section 8 (a)(1) and (3) of the Act.

There is persuasive evidence in the record that Respondent discharged the employees, in substantial part, because it learned, between the time Andrew Loehndorf called the tavern and talked to Harrison and the time she arrived at the plant, that the cutters had signed union cards. To be sure, there is no direct evidence that Respondent's officials knew prior to discharging the employees that they had engaged in union activities, and the two who testified denied that they had such knowledge, but there is strong circumstantial evidence to support this conclusion. Harrison and the other cutters signed their union cards at the tavern and obtained signatures of a number of other employees who came there for lunch at about 11:15 a.m. One of the employees

who came to the tavern for lunch, identified only as Willie, was asked by Harrison to take some cards to the plant and have them signed by some of the Puerto Rican employees who did not normally eat at the tavern. He did so and return the signed cards to Harrison during his luncheon period. She placed them on the stack of other cards on the bar where she was sitting. Among those who came to the tavern for lunch during the 11:15 luncheon break were Don Miller, supervisor over the sizing room, and Mike Colon, supervisor over employees of the cutting room including the cutters who were then in the tavern. Harrison, observing him at the other end of the bar from where she was sitting, approached him and ascertained from his his estimate of the number of employees working at the plant. She then announced to some of the other cutters, "We have enough cards now." At that time she had about 23 signed cards. There is no evidence that Colon was in hearing range of Harrison's remark about having enough cards or that he actually saw any union cards.[9] Moreover, Harrison had cautioned

[9] Colon was called as a witness by the General Counsel, who sought to interrogate him under Rule 43(b). When the undersigned ruled that Colon had not been qualified as a Rule 43(b) witness, only a few questions were asked him. Colon testified that when he returned to the plant he told Richard Loehndorf only that the cutters, including Cora Tatum, were at the tavern and in response to Loehndorf's question as to whether they were drinking, he replied that there were glasses in front of them. Richard Loehndorf testified that, in addition to Colon, one of the employees whom he could not identify told him that the cutters were in the tavern.

"Willie" not to let any of the "office people" see him distributing the cards she gave him. Nevertheless, with as many as about 23 cards being signed in so short a period of time and with two of Respondent's supervisors present at the tavern when some of them were being signed, it would be surprising if this did not come to the attention of one of Respondent's officials at some time during the afternoon.

Strongly supporting an inference that Respondent did learn of the union activities and was motivated, at least in part, by that fact in discharging the cutters is the circumstance that management representatives, despite the expressed reluctance of Richard Loehndorf to take them back, decided at about 12:30 p.m. on February 7, to grant raises to all plant employees, including the cutters who had walked out, and Andrew Loehndorf, at about 1 p.m., called the tavern for the purpose of having the cutters who might be there come back to the plant and talk over the 10-cent raise Respondent was willing to give them, then suddenly changed his mind before Harrison arrived. Since the cutters had requested a 15-cent raise, Respondent could not, of course, know whether they would accept a 10-cent raise and return to work on that basis. It is reasonable to assume that Respondent's representative intended to try to persuade them to accept the latter amount and return to work. Why, then, did Respondent's officials change their minds during the afternoon about seeking to induce the employees to come back at a 10-cent increase in pay? Why, prior to Harri-

son's arrival, were telegrams being prepared and transmitted, telling the cutters that they were being dismissed for "refusal to work" that morning? Why did Respondent's officials give contradictory and inconsistent explanations at the hearing as to the reasons for terminating the cutters, such as: because they refused to work that morning; because they refused to come back to work when called (although no attempt was made to reach other employees when it was learned that only Harrison was at the tavern); and because Harrison, when she finally arrived at the plant at about 3 p.m. (while the discharge telegrams were already being transmitted) had liquor on her breath and was in no condition to work between then and the 3:30 quitting time.[10] I am convinced that the only reasonable answer to these questions is that Respondent learned, during the interim between Andrew Loehndorf's first talk with Harrison and her arrival at the plant, that the cutters had signed union cards and that Respondent was motivated, at least in part, by this factor in deciding to dismiss them. The discharges were therefore in violation of Section 8(a)(3) and (1) of the Act.

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[10] In view of the patently unreliable character of the testimony of Richard Loehndorf and Don Ledrowski, I am inclined to credit the testimony of Harrison (who, on the whole, impressed me as reliable) that she had imbibed nothing but a "soda pop." However, regardless of whether she had been drinking something stronger, that factor obviously could have had nothing to do with the decision, already made, to discharge her.

Even if I should be mistaken, however, in finding that Respondent knew of the cutters' union activities prior to discharging them and was motivated, at least in part by that factor, the discharges were nevertheless in clear violation of Section 8(a)(1) of the Act.

There can be no question but that the walkout of the cutters on the morning of February 7 was concerted action on their part as a consequence of or in connection with their attempt to discuss and obtain an immediate wage increase. It grew out of a "labor dispute" within the meaning of Section 2(9) of the Act and the cutters remained employees within the meaning of Section 2(2) of the Act. Although they purported to interpret Loehndorf's statement to them as a grant of the day off, they, of course, did not believe that he was willingly giving them a day off from work. As employee McDowell acknowledged, and as must have been apparent to the other cutters, Loehndorf appeared unhappy and disturbed when they started walking out. The fact that the employees deliberately sought to misinterpret Loehndorf's remarks to mean what they believed was to their advantage does not, however, alter the fact that they were acting in concert to accomplish their purpose—the prompt granting of a wage increase. It is clear that they intended—even before being so advised by the union agent whom they consulted later that morning—to return to work on the following day and hopefully with their purpose accomp-

lished. One of them, Jones, as already noted, remarked to the others as they were walking out, "When I get back in the morning . . . I bet you I have a raise," and several replied that they would wait and see. But even if they had not intended to return to work the next morning, they unquestionably were engaging in a protected concerted activity for their mutual aid and protection and could not lawfully be discharged because of their walkout.

If, as Respondent asserts, it discharged them for walking out and failing to return to work before any replacements were hired, Respondent manifestly violated Section 8(a)(1) of the Act. It might be argued that the employees acted unwisely or unreasonably in walking out without giving Richard Loehndorf time in which to consult with his father and brother about their demands, even though he was unwilling to let them wait in the lunch room until the father and brother arrived or to assure them of prompt action on their demands. But, as the Supreme Court pointed out in *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 916, "It has long been settled that the reasonableness of workers' decisions to engaged in concerted activity is irrelevant to the determination of whether a labor dispute exists or not" and the employees are protected under Section 7 of the Act when they engage in such concerted activity growing out of their labor dispute.[11] Respondent accord-

[11] See also, *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 and *N.L.R.B.* v. *Leprino Cheese Co.*, 424 F.2d 184 (C.A. 10), cert. denied 400 U.S. 915.

ingly interferred with, restrained and coerced them in the exercise of those Section 7 rights and thereby violated Section 8(a)(1) of the Act insofar as it discharged them for engaging in the walkout.

Respondent alleges that the case of Cora Tatum must be judged on a diffeernt basis from that of the other cutters. She was absent from work on February 7 when the other cutters walked out and therefore could not have been discharged for walking out. During the preceding week she had been absent from work for 4 days with the "flu" and was still not feeling well when she reported to work on Monday, February 5. For that reason she was permitted to do less strenuous work than her regular saw cutting work. Toward the end of the day she told Richard Loehndorf that she would not be at work the next day unless she was feeling better. She did not feel better and stayed at home, making an appointment with her doctor for 1 p.m. on the following day, February 7. As already noted, during the morning of February 7, at McDowell's request she brought McDowell's car to the tavern and accompanied the other cutters to the union office, then returned with them to the tavern and was observed by Supervisor Colon and others who came there for lunch at 11:15 a.m. She recived the same kind of telegram which the other cutters received, informing her that she was dismissed "because of refusal to work at 7 a.m. on Wednesday, February 7." When she returned to the plant with the other cutters the next morning to inquire why she was fired, Richard

Loehndorf asked her if she had not been over at the tavern with the other cutters on the preceeding day and refused to accept her explanation that she had merely brought McDowell's car to her and had a doctor's appointment at 1 p.m.

Respondent contends that despite what was said on the telegram dismissing Tatum, she was in fact discharged for excessive absenteeism, about which Richard Leohndorf had talked to her on the Monday preceeding her discharge, and the fact that she was in the tavern with the other cutters when she could have been working. A comparison of her attendance record with that of the other cutters discloses that her attendance record is no worse than that of most of the other cutters and not as bad as that of several others. One of them, Harrison, was given a 3-day suspension from work in 1972 for failing to report for work. I do not for a moment believe that Tatum's recent absences while recovering from a bout with the "flu" had anything to do with her discharge and am confident that if Respondent had regarded her absences as sufficiently serious, it would have given her a disciplinary layoff, as it had given Harrison in 1972, rather than discharging her. It is manifest from all the evidence that Respondent discharged Tatum along with the other cutters because it believed that she was making common cause with them in their concerted attempted to get prompt wage increases and that her discharge, like theirs, was in violation of Section 8(a)(1), if not also Section 8(a)(3) of the Act. It is not important whether

these discharges be considered a violation of Section 8(a)(1), Section 8(a)(3) or of both sections of the Act, for in any event, the order necessary to remedy the unfair labor practices found would be substantially the same.

Conclusions of Law

1. By discharging employees Lena Roby, Ollie McDowell, Ethel Jones, Maria Hall, Barbara Harrison, Marilyn Wesley, Vergie Dennis, Vigie Jeanes and Hilda Cruz because they engaged in protected concerted activities, including union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

2. By discharging employee Cora Tatum because it believed that she was making common cause with the other cutters in their concerted action to obtain wage increases, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, my recommended Order will require that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

All of the 10 cutters named in the complaint (except Cora Tatum who was absent from work for health reasons) walked out of the plant on the morning of February 7 in connection with their concerted effort to obtain an immediate wage increase and it is clear from the record that 9 of the 10 would not have worked that day even if they had not been discharged during the afternoon. But for their unlawful discharge, it is a reasonable assumption that all (except Cruz, who was ill on February 8) would have returned to work on February 8. Cruz apparently would have been reinstated on February 8 had she reported for work then since Respondent was willing to accept her explanation made to her supervisor the evening before that she walked out only because she was told by some of the cutters that there was no work to be done. She was reinstated when she reported for work on Friday, February 9. No backpay or reinstatement order is necessary, therefore, to remedy her unlawful discharge. To remedy Respondent's unlawful discharge of and refusal to reinstate the others, however, Respondent will be required to offer each reinstatement to her old job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and to make each whole from February 8, 1973 to the date she is offered reinstatement, the backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289, with interest added thereto

in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, there is hereby issued the following recommended:[12]

ORDER

Respondent, Bagley Produce, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to reinstate or otherwise discriminating against any employees for engaging in protected concerted activities, including union activities, for their mutual aid and protection.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to each of the employees named below reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position,

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[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

without prejudice to her seniority and other rights and privileges, and make each whole for her lost earnings in the manner set forth in the section of this decision entitled "The Remedy."

Lena Roby	Barbara Harrison
Ollie McDowell	Marilyn Wesley
Ethel Jones	Vergie Dennis
Maria Hall	Vigie Jeanes
Cora Tatum	

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Milwaukee, Wisconsin plant copies of the attached notice marked "Appendix." [13] Copies of the notice on forms provided by the Regional Director for Region 30, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places

[13] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated August 22, 1973, Washington, D.C.

/s/ Fannie M. Boyls
FANNIE M. BOYLS
Administrative Law Judge

APPENDIX

[SEAL] [SEAL]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discharge, refuse to reinstate or otherwise discriminate against any of our employees because they have engaged in protected concerted activities for their mutual aid and protection or because they have engaged in union activity.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL offer to each of the employees listed below immediate and full reinstatement to the job she held immediately before February 7, 1973, or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make each whole for any loss of earnings she may have suffered as a result of her discharge, plus 6 percent interest:

Lena Roby	Barbara Harrison
Ollie McDowell	Marilyn Wesley
Ethel Jones	Vergie Dennis
Maria Hall	Vigie Jeanes

Cora Tatum

BAGLEY PRODUCE, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building—2nd Floor, 744 North 4th Street, Milwaukee, Wisc. 53203 (Tel. No. 414-224-3861).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 579913 193

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975 Case No. 74-1504

BAGLEY PRODUCE, INC.,

Petitioner,

-vs-

NATIONAL LABOR RELATION BOARD,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

EISENBERG & KLETZKE

1131 West State Street
Milwaukee, Wisconsin 53233

Attorneys for Petitioner

IN THE

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-vs-

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Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

This petition is made pursuant to Rule 58(2) of the Rules of the Supreme Court wherein this Court has enumerated its power to rehear any petition for a writ of certiorari where it is shown that "intervening circumstances of substantial or controlling effect or...other substantial grounds available to petitioner although not previously presented."

Petitioner herein strongly asserts that actions taken by the plaintiff employees, after petitioner's filing of the original request for a writ of certiorari, strongly affect the material facts in this case. This whole action was brought on the grounds that petitioner wrongfully fired a number of his employees for participating in "concerted activities." This was the sole issue that remained throughout this lawsuit and it was the decision of the United States Court of Appeals that petitioner fired its employees for just such a reason that prompted the application for a writ of certiorari. Petitioner has contended at all times that the reason the employees were dismissed was for other improper conduct that had nothing to do with any concerted activity. It was petitioner's contention that no one likes to be left without a job and that the myth of "concerted activity" was created merely to gain reinstatement to their former positions.

Although this Court has denied the writ of certiorari requested by petitioner, the activities of this employee group since this request was filed, clearly indicate that the fact of concerted activity did not exist. In another action started by these employees against petitioners they alleged as the sole ground of their dismissal the fact of racial

discrimination. Although this was not the reason they were dismissed, it indicates that this group of employees are irrate about losing their jobs and will attempt anything to gain reinstatement. There was no concerted activity, as indicated by these employees' complete reliance on discrimination as their ground for the second attack and there was no discrimination as the Court subsequently found.

The employees' actions in this case are a simple indication of harrassment of management for exercising its inherent right to discharge employees for just cause. Petitioner therefore prays that this Court grant a rehearing on the issue of the petition for a writ of certiorari.

Respectfully submitted,

EISENBERG & KLETZKE

/s/ Sydney M. Eisenberg
Sydney M. Eisenberg

POST OFFICE ADDRESS:
1131 West State Street
Milwaukee, Wisconsin 53233
Telephone Number: 271-0931

CERTIFICATE

STATE OF WISCONSIN)
) SS
MILWAUKEE COUNTY)

SYDNEY M. EISENBERG, being first duly sworn on oath, deposes and says:

1. That he is the attorney for petitioner BAGLEY PRODUCE, INC., in this case and makes this Certificate in compliance with Rule 58(2) of the Rules of the Supreme Court;

2. That he has caused, on behalf of petitioner, a petition for writ of certiorari to be brought before this Supreme Court;

3. That said petition was duly denied by the Supreme Court on October 1, 1975.

4. That he presents this petition for rehearing of the petition for a writ of certiorari in good faith and not for delay;

5. That this petition is restricted to the grounds asserted by petitioner in the above statements;

6. That he is making this Certification in support of petitioner's request for a rehearing of the petition for a writ of certiorari.

DATED at Milwaukee, Wisconsin, this 22nd day of October, 1975.

/s/ Sydney M. Eisenberg
Sydney M. Eisenberg

SUBSCRIBED and SWORN to before me this 22nd day of October, 1975.

/s/ William C. Mosher
NOTARY PUBLIC, Milwaukee County, Wisconsin
My Commission ~~Expires:~~ is permanent

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
EQUAL RIGHTS AND LABOR STANDARDS DIVISION

STATEMENT OF EMPLOYMENT COMPLAINT

Lena Roby, et al
Name

3345 North 25 Street
Address

Milwaukee, Wisconsin
City

Complainant

VS

Bagley Produce
Name

1101 W. Canal Street
Address

Milwaukee, Wisconsin
City

Respondent

This Complaint Concerns -

( ) Hire ( ) Wages

(X) Discharge ( ) Condition of Employment

TMA3-0524

( ) Age ( ) Sex

(X) Race ( ) Handicap

( ) Creed ( ) National Origin

( ) Color ( ) Ancestry

RECEIVED MAR 5 1973 U.S. EEOC MILW. DIST. OFFICE

Please state all relevant details, being specific as to names, dates, etc.

On February 7, 1973, we, all Black employees, went to talk with Richard Loehndorf to ask for a raise for the cutters. One cutter, Cora Tatum, was not with us because she was on sick leave under doctors care. Mr. Loehndorf told us he was too busy to talk about it, he had to talk with his father and brother and that we should take the day off and think about it. The same day he sent us telegrams at home telling us that we were terminated because we refused to work. This was not what happened - we reported ready to work but were told to go home. There are 10 cutters employed, 9 are Black one is Spanish Speaking. The Spanish Speaking girl was with us when we asked for the raise, however, is still working. We feel we have been discriminated against in this termination because of our race in violation of Wisconsin's Fair Employment Practices Law, and the Civil Rights Act of 1964.

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Lena Roby, Olive McDowell, Cora Tatum, Virgie Jeanes, Marilyn Wesley, Ethel Jones, [redacted], [redacted], [redacted], all being duly sworn, depose and say that they are the complainant's herein; that they have read the attached complaint and know the contents thereof; that the same is true of their own knowledge except as to those matters therein stated on information and belief; and that as to those matters they believe the same to be true.

Lena Roby

Olive McDowell

Cora Tatum

Virgie Jeanes

Marilyn Wesley

Ethel Jones

[redacted]

[redacted]

[redacted]

Subscribed and sworn to before me this 12th day of February, 1973.
Notary Public [redacted] County, Wisconsin
My Commission expires Aug 11 1974

BEST COPY AVAILABLE

RECEIVED
MAR 5 1973
U.S. EEOC
MILW. DIST.
OFFICE

THERE IS NO PAGE EIGHT.

March 6, 1975

Charge No: TMK3-0519

Ms. Ethel Jones
2143 North First Street
Milwaukee, Wisconsin 53212 Charging Party

vs.

Bagley Produce
1101 West Canal Street
Milwaukee, Wisconsin 53233 Respondent

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19 b (d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended in March 1972, and the timeliness, deferral, and all other jurisdictional requirements have been met.

Charging Parties allege that Respondent has committed an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended in March, 1972, by discharging them on the basis of their race/Negro.

It is undisputed that Charging Parties were employed with the Respondent as cutters.

Investigation revealed that on the morning of February 7, 1973, Charging Parties, who are Negro females and a Spanish Surnamed American female, approached Respondent to request a raise for the cutters. Charging Parties testified that Respondent told them to take the day off and think about it.

Evidence of record shows that Charging Parties, but not the Spanish American female, left the Respondent facility and met in a place next to the plant, and signed authorization cards and also obtained signatures of other employees. These authorization cards were to be used in an effort to unionize the Company employees.

Evidence of record further revealed that Respondent President was made aware of the concerted activity and subsequently sent telegrams to the homes of the Charging Parties, informing them that they were terminated because they walked off their job.

Respondent Attorney, denies the alleged discriminatory practice because of race and states that the Respondent discharged the Charging Parties because they refused to work, and no discrimination was practiced.

Charging Parties testified subsequent to the charge that they believe they were terminated for attempting to join a union not because of their race, and that the Spanish American female had no involvement in the concerted effort to join the union.

A Decision Order issued December 28, 1973, by the National Labor Relation Board concluded that

Respondent discharged the Charging Parties because they engaged in protected, concerted activities.

We therefore conclude that there is no reasonable cause to believe that Respondent Employer has discriminated against the Charging Parties in violation of Title VII, as alleged.

This determination concludes the Commission's processing of the subject charge. Should the Charging Parties wish to pursue this matter further, they may do so by filing a private action in Federal District Court within ninety (90) days of the receipt of this letter and by taking the other procedural steps set out in the enclosed "NOTICE OF RIGHT-TO-SUE."

On behalf of the Commission:

/s/ Wesley N. Harry
Wesley N. Harry
District Director

Mar. 6, 1975
Date